Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

No. 99-237

In the

Supreme Court of the United States

CHIROPRACTIC AMERICA,

Petitioner,

v.

JAYNEE LAVECCHIA, in her official capacity as Commissioner of Department of Banking and Insurance (DOB&I), and DONALD BRYAN, in his official capacity as Assistant Commissioner for Legislative and Regulatory Affairs of DOB&I, CHRISTIE WHITMAN, in her official capacity as Governor of the State of New Jersey,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1.Whether a Petition for Writ of *Certiorari* should be denied where the lower federal courts, pursuant to Burford abstention principles, declined jurisdiction, despite the allegation of federal constitutional violations, where resolution of the issues alleged in the complaint would require the federal court to interfere with state efforts to regulate in an area of law in which state interests predominate and an adequate and timely state court review was available and pending.

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STATEMENT OF THE CASE

Petitioner in this matter seeks review of the Third Circuit's decision to affirm the United States District Court for the District of New Jersey's decision to abstain, under Burford, from the exercise of jurisdiction in favor of allowing the pending New Jersey state court review of regulations promulgated by the New Jersey Commissioner of Banking and Insurance ("Commissioner") to implement the state's comprehensive private passenger automobile insurance reform legislation, the Automobile Insurance Cost Reduction Act,("AICRA" or the "Act"), P.L. 1998, c. 21 and 22 as amended by P.L. 1999 c. 52, to proceed to conclusion. The respondents oppose the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

By way of background, on May 19, 1998, AICRA was enacted in the State of New Jersey. The Act brought about comprehensive reforms to New Jersey's private passenger automobile insurance system, and the State's no-fault law in order to reduce the escalating costs of such insurance. As part of its many significant reforms, the Act calls upon the Commissioner to promulgate regulations to establish standards against which to measure the medical necessity of treatments and diagnostic testing for purposes of determining reimbursement by private passenger automobile insurers under the first-party personal injury protection medical expense benefit component of the insurance policy. See N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). Petitioners challenged the regulations adopted by the Commissioner to implement this provision of AICRA.

As part of AICRA's legislative findings, the New Jersey Legislature explained that "the substantial increase in the cost

of medical expense benefits indicates that the benefits are being overutilized for the purpose of gaining standing to sue for pain and suffering, thus undermining the limitations imposed by the [verbal] threshold and necessitating the imposition of further controls on the use of those benefits, including the establishment of a basis for determining whether treatments or diagnostic tests are medically necessary." N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). The Legislature also found that the existing arbitration system "has not sufficiently addressed the Legislature's goal of eliminating payment for treatments and diagnostic tests which are not medically necessary, leading to the belief that a revised dispute resolution mechanism needs to be established which will accomplish this goal. N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999). Based on this finding, the Legislature directed the Commissioner to define "standard professional treatment protocols" to determine "the most appropriate standard or level of service" for the diagnosis and treatment of certain common automobile injuries. See N.J. Stat. Ann. § 39:6A-2m (West Supp. 1999).

Pursuant to N.J. Stat. Ann. §§ 39:6A-2m and 39:6A-3.1(4)(a) (West Supp. 1999), the Commissioner enlisted the services of a health benefits consultant, conferred with the New Jersey Department of Health and Senior Services and the professional licensing boards of the New Jersey Division of Consumer Affairs, and established standard treatments and diagnostic tests against which the medical necessity of treatments can be measured for purposes of reimbursement under an insurance policy. These standards will serve to combat fraudulent medical claims and the overutilization of medical expense benefits, eliminate unnecessary medical treatment and diagnostic testing and, in turn, eliminate unnecessary costs to the State's private passenger automobile

insurance system. Patients seeking additional treatment, or treatment that otherwise varies from the general guidelines contained in the care paths within the regulations, will receive reimbursement if such treatment is medically necessary and based on objective clinical findings. See, N.J. Admin. Code tit. 11, § 3-4.6(c) (Supp. 3-15-99), and N.J. Admin. Code tit. 11, § 3-4.7(b) (Supp. 3-15-99). The regulations themselves do not determine the extent or type of care to be obtained from or provided by any given provider. Rather, the administrative scheme merely outlines those basic services which carriers must presumptively reimburse to their insureds.

The regulations at issue in petitioner's complaint were the subject of an extensive administrative process. Following initial publication of the rule proposal in the New Jersey Register on September 8, 1998, 30 N.J. Reg. 3211(a) (September 8, 1998), public comment was sought and received during a public comment period which was extended to November 4, 1998. 30 N.J. Reg. 3748(a) (October 19, 1998) The Commissioner also provided notice that she would hold a public hearing on November 4, 1998, in order to elicit testimony from interested parties regarding the rule proposal. A broad spectrum of representatives of health-care providers including physicians, osteopaths, and chiropractors provided written comments and oral testimony regarding the medical protocol regulations. Attorneys, medical and chiropractic associations, insurers and their trade associations, and other interested members of the public also participated in the rulemaking process. Counsel for Chiropractic America and individual members from petitioner's association also voiced their opinions at the public hearing. Before the rules were adopted, the Commissioner revised provisions of the regulations and adjusted the care paths therein to account for

pertinent recommendations made by members of the public and the various State professional licensing boards.

The regulations were adopted by the Commissioner on November 30, 1998, and published in the New Jersey Register and made effective on December 21, 1998. See, 30 N.J. Reg. 4401(a) (December 21, 1998) The regulations became operative on March 22, 1999, generally meaning that reimbursement of medical benefits for all new and renewal automobile insurance policies issued or processed on or after that date will be governed by policy language that reflects the standards established by the medical protocol regulations, N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). Disputes relating to the payment of personal injury protection benefits for services and treatments rendered under the new policies will be resolved through the new dispute resolution mechanism established by the new regulations, N.J. Admin. Code tit.11, § 3-5 (Supp. 3-15-99). See, note to N.J. Stat. Ann. § 39:6A-1.1 (West Supp. 1999).

On November 4, 1998, before the regulations being challenged had been finally adopted, Chiropractic America prematurely sought federal review of the proposed administrative regulations, 30 N.J. Reg. 3211(a) (September 8, 1998) On December 21, 1998, the respondents moved to dismiss the complaint under Fed. R. Civ. P. 12 (b) (1) and (b) (6) and/or multiple abstention doctrines.[1]

On January 11, 1999, petitioner filed a First Amended Complaint naming various professional organizations and

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[1]L. Civ. R. 7.1(f) and Appendix N. Optional Motion Procedures required that the Notice of Motion not be filed with the Court until the motion was fully briefed. Therefore, it was not filed until January 25, 1999.

individual chiropractors as additional plaintiffs. Petitioner also filed a cross-motion for a plenary hearing on a preliminary injunction in which it sought to enjoin the Commissioner from implementing the newly adopted regulations as they relate to treatments provided or testing conducted by chiropractors.

Shortly thereafter, on January 13, 1999, petitioner filed a notice of appeal in the New Jersey Superior Court, Appellate Division, challenging N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). This appeal joined two others which had been filed after the regulations were adopted and before Chiropractic America filed its First Amended Complaint in federal court. On January 7, 1999, the New Jersey Coalition of Health Care Professionals, et al., ("Coalition") filed a notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of N.J Admin. Code tit. 11, § 3-4. On January 8, 1999, the Association of Trial Lawyers of America - New Jersey, ("ATLA") filed a notice of appeal challenging the same regulation. On that same date, ATLA filed another notice of appeal to challenge portions of N.J. Admin. Code tit. 11, § 3-3, governing the basic policy, and N.J Admin. Code tit. 11, § 3-5, governing the alternative dispute resolution process. On February 16, 1999, the Appellate Division granted ATLA's unopposed application to consolidate its appeal from N.J. Admin. Code tit. 11, § 3-4 with that filed by the Coalition. The Appellate Division then consolidated all appeals, sua sponte.

In the interim, the district court severed the respondents' motion to dismiss and the petitioner's cross-motion for a plenary hearing, and heard oral argument on the motion to dismiss on February 5, 1999. At the conclusion of the oral argument, the district court entered an order dismissing the

matter on Burford abstention grounds. Burford v. Sun Oil Co., 319 U.S. 315 (1943). Pa-Appendix B at 30a.[2]

Petitioner filed a notice of appeal from the district court's decision on February 11, 1999. On petitioner's motion, the United States Court of Appeals for the Third Circuit accelerated the matter and directed that briefs be exchanged on or before February 24, 1999. Oral argument was heard on March 2, 1999.

On April 14, 1999, the United States Court of Appeals for the Third Circuit affirmed the district court decision to abstain from the exercise of jurisdiction on Burford abstention grounds. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 11, 1999. A Final Order on the Mandate of the Third Circuit was entered on June 14, 1999.

While the federal proceedings made their way through the district court and the Court of Appeals, the state court appeals, to which petitioner was a party, proceeded. On January 28, 1999, the Commissioner denied the Coalition's motion to stay the March 22, 1999 implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99) pending the outcome of the appeal. On March 1, 1999, the Coalition filed an emergent application with the New Jersey Superior Court Appellate Division to stay implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). ATLA joined this application. Thereafter, the Appellate Division granted the

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[2]The decision of the Third Circuit Court of Appeals is contained in Appendix A to the petition for *certiorari*, while the decision of the District Court is contained in Appendix B. The abbreviation "Pb" refers to the petition for *certiorari* and "Pa" refers to the appendix to the petition.

National Association of Independent Insurers and three other insurance trade organizations leave to intervene in the case. The Commissioner and the insurer intervenors opposed the requests to stay implementation of the regulation. Following oral argument on March 17, 1999 on the motion to stay, the Appellate Division denied the application but accelerated the briefing schedule on all appeals. On March 22, 1999, the New Jersey Supreme Court also denied applications to stay implementation of N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99).

Subsequently, the American Association of Osteopathic Physicians, the New Jersey State Bar Association, and the Brain Injury Association were granted leave to appear as amici before the Appellate Division to support the challenges to N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99). On May 12, 1999, the Appellate Division heard oral argument by all parties. On June 14, 1999, the court issued a consolidated written opinion disposing of all issues.[3] ATLA and the Coalition filed notices of petitions for certification by the New Jersey Supreme Court on July 6, 1999, which petitions are presently pending.

The New Jersey Superior Court, Appellate Division specifically upheld the regulations at issue in the petitioner's federal challenge, N.J. Admin. Code tit. 11, § 3-4 (Supp. 3-15-99), as being within the scope of the statutory authority extended to the Commissioner and consistent with the legislative intent underlying AICRA.

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[3]New Jersey Coalition of Health Care Professionals, Inc., et al. v. New Jersey Department of Banking and Insurance, Division of Insurance, 323 N.J. Super. 207 (App. Div. 1999).

The significant legislative reforms of AICRA and the corresponding reductions in private passenger automobile insurance rates by an overall 15 percent, including at least 25 percent from the territorial base rate applicable to the personal injury protection medical expense benefits component, have been in effect since March 22, 1999.

Petitioner urges this Court to exercise jurisdiction, but offers no legal basis to justify further review of the decision below, which involved an exercise of lawful discretion to abstain under established Burford principles. Further review of the Burford abstention doctrine is unnecessary and will merely result in affirming the judgment below.

In affirming the district court's decision, the court of appeals analyzed the presence of Burford considerations. The lower court correctly determined that petitioner could and did avail itself of a timely and adequate state court review. Pa-Appendix A at 9a. It also determined that federal court adjudication of petitioner's claims would interfere with New Jersey's effort to implement an important policy concerning its no-fault automobile insurance law. Pa-Appendix A at 10. Reform of the State's private passenger automobile insurance system and the reduction in insurance premiums involves a matter of substantial and important local concern. Moreover, the regulations are an element of a comprehensive regulatory scheme whose technical components are intertwined to effect a comprehensive reform of the prior abuses to the automobile insurance system. Pa-Appendix A at 10a-11a. Federal review of petitioner's constitutional claims would interfere with New Jersey's efforts to establish and maintain a coherent regulatory policy aimed at eliminating unnecessary medical expense claims and reducing the high cost of automobile insurance in New Jersey. Pa-Appendix A at 11a. Finally,

the court of appeals rejected the tendered argument that allegations of federal constitutional violations under 42 U.S. Code Ann. § 1983 preclude dismissal of the complaint on the basis of Burford abstention. Pa-Appendix A at 14a-16a. The court distinguished Bath Memorial Hospital v. Maine Health and Finance Comm'n, 853 F.2d 1007 (1st Cir. 1988) on the ground that the petitioner here sought an individualized fact-specific review of the regulations promulgated by the Commissioner. The court concluded that the nature of the federal claim, rather than the mere assertion of a federal claim is the proper focus, under established precedent, for determining whether abstention is appropriate. Pa-Appendix A at 15a. Because federal court review of petitioner's federal constitutional due process challenge would require an analysis identical to that being performed by the state court, abstention was appropriate to prevent a parallel federal regulatory review institution. Pa-Appendix A at 15a. State court review on state law grounds could obviate the need to address the federal constitutional issues. Accordingly, the court correctly held that abstention under Burford was appropriate.

The decision of the Third Circuit Court of Appeals is entirely consistent with the decision of this Court in Burford and the progeny of cases relating to abstention doctrines decided by this Court and other federal circuit courts.

REASONS FOR DENYING THE WRIT

I. THE COMPELLING REASONS NECESSARY FOR A REVIEW ON A WRIT OF *CERTIORARI* ARE NOT PRESENT WHERE THE LOWER FEDERAL COURTS APPLIED ESTABLISHED LEGAL PRINCIPLES TO SPECIFIC FACTUAL CIRCUMSTANCES AND DETERMINED THAT ABSTENTION UNDER BURFORD WAS APPROPRIATE TO AVOID INTERFERENCE WITH NEW JERSEY'S EFFORTS TO REGULATE IN AN AREA OF LAW IN WHICH STATE INTERESTS PREDOMINATE AND AN ADEQUATE AND TIMELY STATE REVIEW WAS AVAILABLE.

The decisions of the lower federal courts in this matter are premised on the specific factual circumstances presented and apply only to the litigants involved. The lower federal courts applied established legal principles and concluded that a review of the challenged regulations by the state court was appropriate, in the first instance, since the regulation of automobile insurance is an area in which local, rather than federal interests, predominate. Both the decision to abstain and the analysis of Burford abstention considerations undertaken by the lower courts are consistent with well-established legal precedent. The decision does not conflict with any opinions of the other circuit courts; nor does the courts' analysis under Burford represent a departure from accepted legal doctrine. Because the compelling reasons necessary for review on a writ of *certiorari* are not present, the petition should be denied.

Petitioner contends that the Circuit Court opinion articulates an allegedly new principle of law which mandates Burford abstention in every case where adjudication of a state law claim in state court may eliminate the need for the federal court to review a federal constitutional claim. Pb-5. Petitioner misstates the principles articulated by the decision of the Circuit Court. The Burford doctrine has been defined by this Court in New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) ("NOPSI") to involve a series of tests: whether timely and adequate state-court review is available; and whether the case involves difficult questions of state law bearing on important policy problems or issues wherein federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of public concern. Pa-Appendix A at 8a.

In affirming the district court's judgment on the basis of Burford abstention, the Circuit Court concluded that AICRA and the regulations promulgated by the Commissioner "represent a complex legislative regulatory package designed to reform automobile insurance law in New Jersey, and that the courts of New Jersey are in the best position to consider the validity of the applicable regulations under state law and can do so without having to examine the constitutional questions which have been raised." Pa-Appendix A at 7a. Citing to prior decisions of this Court, Burford, supra, 319 U.S. at 333 n.29 and Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173 (1942), the Circuit Court concluded that "[t]hus Burford clearly allows a federal court, in fact urges a federal court, to decline to exercise jurisdiction when adjudication of questions of state law (which can only be done by state courts) may avert the need to delve into constitutional issues like those presented here." Pa-Appendix A at 7a.

The petitioner's federal court complaint alleged that the Commissioner's adoption of regulations, which establish standards against which to measure the medical necessity of treatments and testing to be reimbursed under automobile insurance policies, deprived chiropractors of federal constitutional rights to due process and equal protection. The lower courts determined that an analysis of these constitutional issues would be inextricably entangled in, among other things, the federal court's review of the language of AICRA, the legislative intent underlying AICRA, the complex regulatory scheme implementing automobile insurance reform, and the reasonableness of the standards set forth in the regulations, i.e., whether the regulations are arbitrary and capricious. Pa-Appendix A at 12a.

If a federal court were to engage in a review of technical regulations implementing the state statute reforming portions of the private passenger automobile insurance system, it would have to undertake an identical analysis of the language and the legislative intent underlying the enactment of the statute. This analysis could, if undertaken simultaneously, conflict with the analysis conducted by the state court. Where there exists a substantial risk that federal court review of a subject typically left to the states to regulate might undermine New Jersey's efforts to establish and maintain a coherent automobile insurance regulatory policy, the federal court's decision to abstain is authorized by law and consistent with established legal precedent. The McCarran-Ferguson Act, 15 U.S. Code Ann. §§ 1011-15 (1997) underscores the fact that the regulation of insurance involves a matter of substantial regulatory concern to the states. That Act has been relied upon as persuasive support for abstention under Burford since "the states have assumed the primary role in regulating insurance." Lac D'Amiante du Quebec v. American Home

Assur. Co., 864 F.2d 1033, 1038-1039 (3d Cir. 1988). Moreover, because a timely and adequate review was available and pending in the state court, the lower federal courts correctly concluded that abstention was appropriate. The determination of the federal issues presented was inextricably entangled in a "skein of state law" that needed to be untangled before a federal case could proceed. Pa-Appendix A at 13a.

Once they were satisfied that a timely and adequate state review was available to the petitioner, both the district court and the Circuit Court correctly concluded that the result of the analysis under the second prong of the Burford doctrine justified abstention. The three elements considered by the lower courts in conducting the analysis of the second prong of Burford are : (1) whether the particular regulatory scheme, in this case AICRA and its implementing regulations, involve matters of "substantial public concern;" (2) whether it is "the sort of complex, technical regulatory scheme to which the Burford abstention doctrine is typically applied," Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 534 (3d. Cir. 1988); and (3) whether federal review of a party's claims would interfere with a state's efforts to establish and maintain a coherent regulatory policy. See, NOPSI, supra 491 U.S. at 361. Pa-Appendix A at 10a.

New Jersey's "efforts to curtail sky-rocketing costs of automobile insurance premiums" in the state through legislation and regulation by the Commissioner are matters of substantial and important local interest. The nature of the regulations involved -- an all encompassing framework of technical, intertwined and interrelated provisions defining the applicable deductibles, co-pays and approvals applicable to reimbursement of medical expenses under private passenger

automobile insurance policies -- left no doubt that AICRA and its regulations involve a complex regulatory solution to the abuses of the state's private passenger automobile insurance system. Pa-Appendix A at 11a.

The lower courts' decision to abstain here is also fully consistent with established precedent. Indeed, New Jersey's effort to reform its laws governing private passenger automobile insurance is the subject of a 1985 decision of the district court wherein the federal court exercised its discretion to abstain. In Marks v. Snedeker, 612 F. Supp. 1158 (D. N.J. 1985), the district court, relying on Burford, dismissed the federal constitutional challenge to New Jersey's reform legislation. In that case, the district court found that the federal court's interpretation of the New Jersey statute could have a significant disruptive effect on New Jersey's newly reformed automobile insurance program which is "unquestionably a matter of substantial public concerns." Id. at 1161. The court also found that any constitutional analysis it might undertake would "involve an in-depth analysis of the legislative purposes which underlie a major reform effort in an area of law--- insurance -- which has typically been left to the states to regulate." Id. Pa-Appendix B at 46a. Presented with an analogous situation here, the lower courts conducted an independent analysis and determined, in the face of the federal constitutional challenge to another comprehensive automobile insurance reform initiative, that abstention under Burford was legally supported. Pa-Appendix B at 46a-49a.

Both lower courts correctly concluded that analysis of petitioner's constitutional claims, in light of the fact that the regulations apply to all health care providers, but were challenged by a particular specialty of providers, might lead to a result which could frustrate the uniformity necessary to

achieve the state's important goals. Pa-Appendix A at 11a citing University of Md. v. Peat Marwick Main & Co., 923 F.2d 265, 272 (3d Cir. 1991) (quoting Erwin Chemerinsky, Federal Jurisdiction 111-12 (Supp. 1990)). The courts relied upon the guidance offered by this Court's opinion in NOPSI, that federal adjudication of "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors" may "disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem." NOPSI, supra, 491 U.S. at 362. Pa-Appendix B at 46a.

This Court, recently reiterated that the federal courts' power to abstain under Burford, as with other abstention doctrines, derives from the discretion historically enjoyed by courts of equity. Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 727-728 (1996). Exercise of this discretion involves concern for the principles of federalism and comity. The federal court must carefully consider the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action. Where the state's interests predominate, the dispute should be adjudicated in the state forum. This equitable decision balances the strong federal interest in having certain classes of cases and certain federal rights adjudicated in federal court against the State's interests in maintaining uniformity in the treatment of an essentially local problem and retaining local control over difficult questions of state law bearing on policy problems of substantial public import. Ibid. (citations omitted).

Petitioner further urges review of the decision of the Third Circuit on the basis that the lower court engrafted considerations from disparate abstention doctrines onto its

analysis of Burford considerations. For example, petitioner criticizes the Circuit Court's Burford analysis on the issue of whether state court review on state law grounds may obviate the need to address constitutional questions, see Pa-Appendix A at 16a citing Burford, supra, 319 U.S. at 333 n.29, and claims that in conducting this analysis, the lower court was really engaged in a Pullman[4] analysis. Pullman involves consideration of whether state court review will dispose of an ambiguous or unsettled state law which is "obviously susceptible" to a construction which will obviate the need to decide the federal constitutional issue. Pb6-7. Petitioner's contention lacks legal merit.

The Third Circuit's decision represents the best use of abstention principles consistent with the teachings of this Court. Abstention in its various forms eases the friction between parallel judicial processes. The abstention doctrines are not mutually exclusive. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of consideration designed to soften the tensions inherent in a system that contemplates parallel judicial processes." Pa-Appendix A at 6a quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987).

The Circuit Court expressly noted that "[i]t is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a State court to have an opportunity to determine questions of State law which may prevent the necessity of decision on a constitutional question." Burford 319 U.S. at 333 n.29 citing Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 173 (1942). The "strong resemblance"

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[4]Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

between this language and the Court's language in Pullman evidences that the various doctrines are not "rigid pigeonholes". Appendix A Pa-7a at note 1 and accompanying text.

The abstention doctrines share a common purpose and design. They attempt to reconcile the conflicting pressures of the desire to avoid premature constitutional determinations, to defer to state tribunals on questions of state law, to avoid duplicative proceedings, and to interfere as little as possible with state processes, on the one hand; and show concern for upholding a litigant's choice of a federal forum and the vindication of federal rights without undue delay, on the other. Fireman's Fund Ins. Co. v. Garamendi, 790 F. Supp. 938, 951 (N.D. Cal. 1992), aff'd, Fireman's Fund Ins. Co. v. Quackenbush, 87 F.3d 290 (9th Cir. 1996) citing Henry Hart & Herbert Wechsler, The Federal Courts and the Federal System, (Paul M. Bator, et al.; eds., 3d ed. 1988).

Petitioner also claims that the Third Circuit's consideration of the pending state court action, to which petitioner was a party, for purposes of determining whether petitioner had available an adequate and timely state court review under Burford, erroneously injects elements of Colorado River abstention, which looks to the pendency of parallel state litigation. See Colorado River Conservation Dist. v. United States 424 U.S. 800 (1976); Pb7-Pb10. Once again, petitioner's claim of error lacks merit. The lower courts began their analysis of the applicability of Burford with a discussion of the fact that timely and adequate state court review was, and continued to be, available to the petitioner. Pa-9a and Pa-42a. This element of Burford analysis is well established: "Only if a district court determines that such review is available, should it turn to the

other issues..." Riley v. Simmons, 45 F. 3d 764, 771 (3d Cir. 1995).

Petitioner criticizes the Circuit Court for noting that resolution of the issues raised in the federal court complaint would involve an analysis similar to those which would be undertaken by the New Jersey Superior Court, Appellate Division. It is understandable that in the context of the Circuit Court's examination of whether the state court afforded a timely and adequate review, the court would also take notice of the fact that the pending state litigation would involve an analysis of the same or similar issues as those involved in the federal case. In this regard, Burford's "timely and adequate state review" analysis can resemble the analysis undertaken under Colorado River, which latter analysis looks to whether there is a parallel state proceeding. These analyses, applied in their own contexts, result in the same outcome: a consideration of whether, in light of comity and the nature of the state law issues presented, the initial analysis of the state law issues should be made by the federal court or by the state court. Colorado River's concerns with the avoidance of piecemeal litigation, waste of judicial resources, the convenience of the parties, and risk of conflicting results are not far removed from Burford's attention to whether federal court intervention would interfere with the state's efforts to establish and maintain a coherent regulatory scheme in an area of substantial local concern. The issue of whether the state and federal actions were "parallel" is not a necessary element of either court's analysis. Thus, petitioner's claim that a Colorado River factor was improperly engrafted onto the Burford analysis misstates and distorts the Circuit Court's reasoning.

Both the district court and the Circuit Court correctly predicted that the New Jersey state court review would be accelerated, and that the petitioner and other challengers would have an opportunity to present their requests for a stay to the Appellate Division, and if necessary, the New Jersey Supreme Court, before the regulations would be implemented.

Burford abstention is utilized by the federal courts "'to avoid federal intrusion into matters of local concern and which are within the special competence of local courts.'" Kentucky West Virginia Gas Co. v. Pennsylvania Public Util. Comm'n 791 F.2d 111, 1115 (3d Cir. 1986) (quoting International Bhd. Of Elec. Workers v. Public Serv. Comm'n. 614 F.2d 206, 212 n.1 (9th Cir. 1980)); see also Meredith v. Talbot Cty.,Md., 828 F.2d 228, 231 (4th Cir. 1987) (the underlying purpose of Burford abstention is to enable federal courts to avoid needless conflict with the administration by a state of its own affairs."). 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: § 4243. Pa-Appendix A at 8a.

Here, in addition to allowing the state court to retain control over questions of important state laws and local concerns, the decision of the lower federal court to abstain could focus, if not eliminate, the federal constitutional issues by first having the state court render its definitive ruling on the state law issues. Indeed, it is apparent upon review of the state court decision, that the New Jersey Superior Court, Appellate Division painstakingly considered each of the challenges to the regulations. The state court addressed specific facts regarding the regulations and scrutinized the administrative process. The state court found the regulations to be authorized by the plain language of AICRA and consistent with the legislative intent to reduce automobile

insurance costs by eliminating fraud and the overutilization of medical expense benefits:

> The establishment of standard treatments and diagnostic tests established in N.J.A.C. 11:3-4 are consistent with the legislative intent to discourage the performance of unnecessary medical services. The regulations are designed to provide all necessary medical care to those injured accident victims in need of treatment. They neither deny patients access to care nor interfere with physicians' ability to practice medicine. What the regulations do, however, consistent with AICRA's objective, is to establish meaningful standards against which to measure the reimbursement of medical treatments and diagnostic tests. We conclude the regulations are authorized by AICRA's plain language and consistent with legislative intent. [New Jersey Coalition of Health Care Professionals, supra, 323 N.J. Super. at 239.]

The state court also noted that it perceived that "at the heart of the many physician (and attorney) challenges to the protocols is their inherent opposition to the concept of protocols, the cornerstone of AICRA's legislative reform." Id. at 246-7.

With the state court decision in hand, review of any federal constitutional questions could be narrowly focused, or even eliminated. The lower federal courts correctly anticipated that petitioner's claims of alleged federal due process and equal protection violations could, upon completion of the state court proceeding, be examined in light of the state court's legal analysis and conclusion that the regulations are authorized by AICRA's plain language and rationally related to a legitimate public interest. This result was precisely what the Third Circuit intended and is fully consistent with legal abstention doctrine.

Petitioner's argument that its petition should be granted on the alleged ground that the lower federal courts erroneously considered and commingled various standards relating to various abstention doctrines is no criticism at all. Petitioner's request for review on the basis that the lower federal courts considered Colorado River and Pullman abstention factors to support the decision to abstain on the basis of Burford should be rejected. Contrary to petitioner's contention, the opinions of the district court and the Third Circuit are consistent with the various abstention doctrines and lawfully apply legal precedent to support the decision to abstain.

Petitioner's contention that the decision of the Circuit Court is in conflict with decisions in other circuits (Pb12-Pb14) is also without merit. The decision of the Circuit Court is fully consistent with the decisions of other circuit courts. Any alleged inconsistency with decisions of other circuits in the cases cited by petitioner results from circumstances which are readily distinguishable from those at issue in this matter. It has long been recognized that federal

court review of state administrative regulations prior to state court review might result in the creation of a parallel regulatory review institution to which any litigant challenging a state regulation could resort. This very concern was raised by then-Judge Breyer writing for the Court of Appeals for the First Circuit in Bath Mem. Hosp. v. Maine Health and Fin. Comm'n, supra, 853 F.2d 1007.

Bath recognizes that abstention allows a federal court to avoid the awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, acting as a regulatory decision-making center, makes it significantly more difficult for the state to operate its regulatory system. Id. at 1012. In Bath, Judge Breyer distinguished the requisite review of a statute which regulated hospital charges in a way that interacted with federal law under Medicare's "prospective payment system" from the review of an administrative regulation on the basis that the former review would not entail an analysis of a fact-based agency determination. Review of a legislative enactment with a clear meaning would not be subject to modification or interpretation in the agency regulatory process. Therefore, review of a state statute by the federal court would not pose the risk of interference in a complex state regulatory system. Id. at 1015. Here, the medical protocol regulations are supported by a detailed administrative agency record. In addition, while the medical protocol regulations challenged by the petitioner apply to all health care professionals, federal court review of the regulations solely as they apply to chiropractors, creates a risk of inconsistent judicial determinations which might threaten New Jersey's comprehensive regulatory scheme. Id. at 1013-14. Moreover, Bath involved a Supremacy Clause, U.S. Const.,

Art. IV, challenge to the state statute, and it has been held that federal courts are particularly equipped to apply federal policies relevant to the application of preemption principles. Id. at 1015 (citations omitted). A similar federal policy was not implicated in petitioner's challenge to the Commissioner's regulation. As such, there are important distinctions between Bath and the circumstances presented in this matter.

A similar distinction applies to the Second Circuit's analysis in Alliance of American Insurers v. Cuomo, 854 F.2d 591 (2d Cir. 1988). That matter involved a constitutional challenge to an interim New York state statute which temporarily suspended the authority of the Superintendent of Insurance to order the liquidation or rehabilitation of any medical malpractice insurer and limited the surcharges insurers could impose to satisfy deficiencies within the State's medical malpractice insurance fund. Insurers argued that the law deprived them of constitutionally adequate rates and thus, effected an unconstitutional taking of property without due process. In Alliance there were no ongoing state judicial or administrative proceedings, and no challenge to administrative, regulatory or judicial action under state law was involved; the Superintendent's exercise of the authority conferred to him by state law was not the subject of challenge and the interim nature of the law at issue removed any risk that the state's comprehensive insurance scheme would be jeopardized. Id. at 600. Here, the Commissioner's authority to adopt the medical protocol regulations and the regulations governing the new dispute resolution system form an integral part of petitioner's challenge to important state regulatory matters. See id. at 601. Thus, the circumstances presented in Alliance are inapposite to petitioner's challenge and the case provides no support for the position advance by the petitioner.

The lower court's reasoning here is more analogous to the decision rendered in Fireman's Fund Ins. Co. v. Garamendi, supra, 790 F. Supp. at 951-55, aff'd, Fireman's Fund Ins. Co. v. Quackenbush, supra 87 F.3d at 296-97, which involved an insurer's challenge to the constitutionality of regulations adopted by the California Insurance Commissioner to implement insurance rate rollback provisions pursuant to a state initiative. In Fireman's Fund the district court and the Ninth Circuit found that both Burford and Colorado River abstention doctrines could be invoked because adequate and expeditious state court review was available and the state had established a coherent policy with respect to a matter of substantial public concern involving difficult questions of state law. In the present case, the district court and the Court of Appeals correctly applied the same reasoning to support the dismissal of petitioner's complaint.

Since the lower federal courts' decisions do not conflict with decisions pronounced by any other circuit courts, there is no basis to allege a conflict between the circuits as a basis to assert review on *certiorari*.

Finally petitioner claims that the allegation of federal constitutional violations pursuant to a §1983 claim precludes dismissal of its complaint on the basis of Burford abstention. Pb-9. This contention lacks legal merit. Petitioner relies upon Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1979). That case, involving Colorado River abstention, is anomalous to recent holdings of this Court and those of other circuits. Tovar involved a challenge to the district court's second abstention ruling. In Tovar, the district court initially dismissed the complaint on abstention grounds and directed the plaintiffs to the state court, which court had retained

jurisdiction over an earlier state proceeding. Plaintiffs then filed a second state court action, which action was eventually dismissed. When the litigants returned to federal court at the conclusion of all of the state court proceedings, the district court once again dismissed the complaint on abstention principles. At issue in Tovar was whether the litigants could be twice denied access to the federal court where they had made an appropriate reservation of their federal claims in the state court proceeding. Such circumstances are not present here.

Petitioner's argument notwithstanding, this Court has held that abstention is, indeed, appropriate even where the federal complaint alleges a deprivation of first amendment rights. See, e.g., Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619, 625-626 (1986) (abstaining under Younger where state court proceedings have already been commenced); see also Heck v. Humphrey, 512 U.S. 477, 487 n.8 (1994) (explaining that abstention may be appropriate where there are parallel state court proceedings initiated by a state criminal defendant who files a federal civil-rights suit during the pendency of his state court criminal trial, state court appeal, or state habeas corpus action).

Moreover, contrary to petitioner's assertion, the lower federal courts have frequently applied Burford abstention to support dismissals, even where the complainant asserts a §1983 claim. See, e.g., Graham v. Albemarle, 826 F. Supp. 167, 170 (W.D. Va. 1993), affirmed as modified, 19 F.3d 11 (4th Cir. 1994) (unpublished) (abstention under Burford and Pullman appropriate to dismiss landowner's §1983 claim); Coin Call Inc. v. Southern Bell Telephone and Telegraph Co., Inc., 636 F. Supp. 608, 610-11 (N.D. Ga. 1986) (Burford abstention appropriate in case involving a complex

regulatory scheme controlling pay telephone outlets where plaintiff advances a tenuous constitutional claim, notwithstanding that jurisdiction is grounded on §1983 claim); St. Michael Hospital of Franciscan Sisters, Milwaukee, Inc. v. Thompson, 725 F. Supp. 1038, 1043-44 (W.D. Wis.1989) (Burford abstention appropriate in §1983 action challenging state administrative agency calculation of Medicaid reimbursement rates); Osteopathic Hospital Founders Ass'n Inc. v. Splinter, 955 F. Supp. 1351, 1357-61 (N.D. Okla. 1996) (abstention under Burford appropriate in §1983 action challenging Medicaid reimbursement rate).

In this case, therefore, even in the face of an alleged violation of the chiropractic petitioner's rights pursuant to 28 U.S.C. §1983, the lower courts did not err in the decision to abstain. The Circuit Court here correctly decided that the "focus should not be on *whether* a federal claim has been presented, but rather on the *nature* of that claim." Pa-Appendix A at 15a.

The decision of the district court to abstain, as affirmed by the Third Circuit, is consistent with well-established legal precedent and the precepts of wise judicial administration as reflected in the abstention doctrines. There is, therefore, no basis to support Supreme Court review by means of *certiorari*.

CONCLUSION

For the reasons stated above, the respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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Dated: September 2, 1999